SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 457.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

FREDERICK L. MERRIAM.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Frederick L. Merriam, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Frederick L. Merriam, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 3rd day of December, 1921, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of
2 Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

L. HAND,
U. S. District Judge.

3 *Summons.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF, against FREDERICK L. MERRIAM, DEFENDANT.	L 21–401.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney

within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 1st day of May, in the year one thousand nine hundred and twenty.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

FRANCIS G. CAFFEY,
United States Attorney, Plaintiff's Attorney, Office and Post Office Address, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

4 *Amended complaint*

United States District Court, Southern District of New York.

The plaintiff herein, by its attorney, Francis G. Caffey, United States attorney for the Southern District of New York, for its amended complaint, respectfully shows to this court and alleges, upon information and belief:

I. That the plaintiff is a corporation sovereign.

II. That the defendant is a resident of Tarrytown on the Hudson, in the county of Westchester and State of New York, and resides within the Southern District of New York.

III. That on May 7, 1915, one Alfred G. Vanderbilt, late of the city, county, and State of New York, died leaving a last will and testament which was duly admitted to probate by the surrogates' court of the county of New York on the 16th day of June, 1915, a copy of which said last will and testament is annexed hereto marked "Exhibit A," and made a part hereof.

5 IV. That the defendant duly qualified as an executor of, and as one of the trustees of the trusts created by, said last will and testament, and that letters testamentary were duly issued to him by said surrogates' court on said 16th day of June, 1915.

V. That during the calendar year 1915 defendant received the sum of two hundred and fifty thousand dollars ($250,000) given to him by said will.

VI. That the defendant did not, within four months from said 16th day of June, 1915, pursuant to the provisions of section 2753 of the Code of Civil Procedure of the State of New York, renounce said bequest to him of said two hundred and fifty thousand dollars ($250,000). That no commissions have been allowed or paid to the defendant under said section 2753 of the Code of Civil Procedure of the State of New York, which section contains the only provision in the laws of the State of New York prescribing the amount of

commission or other compensation that the courts of the State of New York may allow to executors of a will or to testamentary trustees upon the judicial settlement of their accounts.

VII. That said bequest of two hundred fifty thousand dollars ($250,000) so received as aforesaid by the defendant was under and pursuant to the terms of said last will and testament in lieu of all compensation or commissions to which defendant would otherwise be entitled as executor or trustee aforesaid, and was, therefore,

part of the gains, profits, and income received by or accrued
6 to defendant during the calendar year ending December 31, 1915, within the intent and meaning of the hereinafter mentioned act of Congress approved October 3, 1913.

VIII. That pursuant to the requirements of Section II of the act of Congress approved October 3, 1913 (38 Stat. 114, 166), the defendant filed on or about the 23rd day of February, 1916, with the collector of internal revenue for the third district of New York what purported to be a true and complete statement of the gains, profits, and income received by or accrued to the defendant during the calendar year ending December 31, 1915.

IX. That by reason of the failure and omission of the defendant to include in his said return of net income for the calendar year ending December 31, 1915, the said sum of two hundred and fifty thousand dollars ($250,000) received by him as aforesaid as part of the gains, profits, and income received by or accrued to him during the said calendar year, the said return so filed by him was incorrect, misleading, and false.

X. That the taxable net income of said defendant for said calendar year ending December 31, 1915, exclusive of said two hundred fifty thousand dollars ($250,000) received by him as aforesaid under said last will and testament, was seventeen thousand two hundred forty-five and 27/100 dollars ($17,245.27), and that his taxable net income inclusive of said sum was two hundred sixty-seven thousand two hundred forty-five and 27/100 dollars ($267,245.27), of which last mentioned amount two hundred fifty-five thousand two hundred fourteen and 2/100 dollars ($255,214.02) was subject to the

normal tax rate of 1%.

7 XI. That by reason of the aforesaid, the defendant became and is liable to pay to the United States of America an additional tax for said calendar year ending December 31, 1915, on the income of the defendant, which additional tax amounts to the sum of $10,912.26, said sum being the difference between the sum of $10,964.40, the tax legally due, and the sum of $52.14, the tax actually paid.

XII. That no part of said additional tax of $10,912.26 has been paid, although duly demanded, and that the same is now due and owing from said defendant to plaintiff, together with a penalty of 5% of the amount thereof and interest on the amount of said additional tax at the rate of 1% per month from the 30th day of June, 1916.

XIII. That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,912.26, together with a penalty of 5% of said sum and interest thereon at the rate of 1% per month from the 30th day of June, 1916, together with the costs and disbursements of this action.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and Post Office Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

8 STATE OF NEW YORK,
County of New York, } ss:
Southern District of New York,

Edward F. Unger, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York and as such has charge of this action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent instead of by plaintiff is that plaintiff is a corporation sovereign and that deponent is duly authorized to make the same.

That the sources of deponent's information and the grounds of his belief as to the matters stated to be alleged upon information and belief are certified copies of the tax return of defendant and communications and documents submitted by the Treasury Department of the United States.

EDWARD F. UNGER.

Sworn to before me this 2nd day of June, 1921.
[SEAL.]
CARL BRECHER,
Notary Public, Kings Co.

Clerk's No. 496, Register's No. 3178. N. Y. Clerk's No. 317. Register's No. 3840. Commission expires March 30, 1923.

9 *Exhibit A to amended complaint.*

Last will and testament of Alfred G. Vanderbilt.

I, Alfred G. Vanderbilt, of the city of New York, do hereby make, publish, and declare this my last will and testament, as follows:

First: I direct the executors of this my will, hereinafter named, to pay out of my estate all my funeral and testamentary expenses and all my just debts as soon after my decease as may be convenient.

Second: I give and bequeath to my beloved wife, Margaret Emerson Vanderbilt, the sum of two million dollars ($2,000,000) in cash,

or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of two million dollars ($2,000,000), with interest on said sum from the date of my decease to the date of the payment to her of such sum, or the transfer and assignment to her of such securities, as the case may be, at the rate of five per cent per annum, in full satisfaction and discharge of my covenants made and contained in the certain antenuptial agreement made and executed by and between us, my said wife, then Margaret Emerson McKim, and myself, at London, England, on the 15th day of December, 1911, and in lieu and discharge of her right of dower in or to my real estate, and of any other right of any nature or character, if any, that otherwise she might have in or to any part of my estate, real or personal (excepting her rights under the further provisions made for her in this my will), as provided in said agreement.

Also, I give and bequeath to my said wife, Margaret Emerson Vanderbilt, the further sum of one million dollars ($1,000,000) in cash, or, in the discretion of the executors of this my will, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of one million dollars ($1,000,000), as and for her absolute property.

I give and bequeath to my said wife, Margaret Emerson Vanderbilt, my house boat "Venture."

Third: I give, devise, and bequeath to my said wife, Margaret Emerson Vanderbilt, my real estate known as "Sagamore Lodge," comprising about fifteen hundred and twenty-six (1,526) acres, and my real estate known as Camp "Kill-Kare," comprising about ten hundred and thirty (1,030) acres, and my real estate known as "Moose River Tract," comprising about two thousand (2,000) acres, and all my other real estate in the county of Hamilton in the State of New York, together with all personal property therein or thereon or used in connection therewith or appurtenant thereto, and all my lands, tenements, and hereditaments situated in England, and my leasehold of an apartment in the property known as Gloucester House, at Piccadilly and Park Lane, in London, England, together with all personal property therein or thereon or used in connection therewith or appurtenant thereto, excepting only moneys, stocks, bonds, or other securities.

Fourth: I give and bequeath to the executors of this my will the sum of five million dollars ($5,000,000) in cash, or, in the discretion of my said executors, in securities to be selected by them from the personal property which I may own at the time of my decease, of the then market value of five million dollars ($5,000,000), in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided: to collect and receive the income and profits from and of the principal thereof, and, after paying therefrom all proper expenses of the ad-

ministration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom, to pay over the balance of said income to my said wife, Margaret Emerson Vanderbilt, quarterly, for and during the term of her natural life; and upon her death, if and provided issue of us shall survive her, to pay over, assign, transfer and deliver the principal of said trust to and among such issue in such shares and proportions as she shall by her last will and testament direct and appoint, or, in default of such appointment, to and among our issue, in equal shares, per stirpes and not per capita.

Fifth: I give and bequeath to each and every child that
12 shall be born to me hereafter, either in my lifetime or after my death, lawful issue of me, the sum of one hundred thousand dollars ($100,000).

Sixth: Exercising the power of appointment given to me by the eleventh article of the will of my father, Cornelius Vanderbilt, I direct that the trust fund which is now held in trust for me under the provisions of said article of said will be paid over, assigned, transferred and delivered to my son William H. Vanderbilt.

Seventh: I give and bequeath to my son William H. Vanderbilt my coach known as the "Venture."

I give and bequeath to my son William H. Vanderbilt the protraits and bust bequeathed to me by the first article of the will of my father, Cornelius Vanderbilt, and the gold medal voted by the Congress of the United States to my great grandfather, Cornelius Vanderbilt, at the close of the War of the Rebellion in 1865, and which medal was bequeather to me by the sixteenth article of the will of my father. If my said son shall not survive me, then I give and bequeath said portraits and said bust and said gold medal to my brother, Cornelius Vanderbilt.

Eighth: I give, devise, and bequeath all my real estate known as "Oakland Farm," at Portsmouth, Rhode Island, and all the live stock and other personal property thereon or used in connection therewith or appurtenant thereto, to the executors of this my
13 will, in trust, nevertheless, to hold and to manage and to maintain the said property for the use of my son William H. Vanderbilt, and to permit him to occupy said farm as a place of residence, and to use said personal property during his minority, in such manner and upon such terms and conditions as may seem advisable to them, and, when he attains the age of twenty-one years, to convey, transfer, assign and deliver to him all the said real estate and so much of the said personal property as they shall not previously have sold or otherwise disposed of under the power hereinafter given to them, and if my said son dies before attaining the age of twenty-one years, then upon his death to convey, transfer, assign and deliver said real estate and said personal property to my oldest surviving son, if any; and if no son of mine be then living, to convey, transfer, assign and deliver all said property to and make the same a part of my residuary estate.

I direct that said real estate shall be kept intact and held as a single property during the minority, or until the death during his minority, of my said son William H. Vanderbilt, and that no part of it shall be sold or in any manner encumbered or disposed of.

I give and bequeath to my said executors securities, to be selected by them from the personal property, which I may own at the time of my decease, in such an amount as they in their discretion shall deem necessary for the purpose, in trust, nevertheless, to hold, or, in their discretion, to sell the same and to invest and reinvest the proceeds thereof as hereinafter provided; to collect and receive
14 the income and profits from and of the principal of said trust, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom to apply, use or pay over, for the maintenance and upkeep of said Oakland Farm, so much of the balance of said income as shall be necessary in their judgment properly to maintain and keep the said property in good order and suitable condition, and to pay over any part that may remain of said balance of said income to and distribute the same among the beneficiaries of my residuary estate in the proportions in which they are entitled to have held in trust or to receive shares of the principal of my residuary estate, until my son William H. Vanderbilt shall attain the age of twenty-one years, or until his decease if he shall not attain the age of twenty-one years, and then to transfer, pay over and assign the principal of said trust to and make the same a part of my residuary estate.

I authorize my said executors, in their discretion, at any time during the term of said trust, to sell or otherwise dispose of any or all of the live stock or other personal property that may be on or used in connection with or appurtenant to said real estate, at public or private sale, and upon such terms and conditions as may seem advisable to them, and in the event they do make a sale or other disposition thereof, or of any part thereof, I direct that the proceeds of such sale or other disposition thereof be paid over and I give and bequeath the same to my son William H. Vanderbilt.

15 Ninth: If I leave surviving me daughters or a daughter, issue of my said wife Margaret Emerson Vanderbilt and myself, then and in that event I give and bequeath to my said executors cash, or, in their discretion, securities to be selected by them from the personal property which I may own at the time of my decease sufficient for the purpose, to hold two million dollars ($2,000,000) in cash, or, in their discretion, securities of the then market value of two million dollars ($2,000,000), in trust, nevertheless, for each such surviving daughter; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits thereof and, after paying all proper expenses of the administration of said trust and all taxes of any kind properly payable upon or in respect to said trust fund or the income therefrom, to apply so much

of the balance of said income as in the judgment of said trustees may be necessary to the support, maintenance, and education of said daughter for whom said principal is so held in trust, during her minority, accumulating meantime any surplus income; when she shall attain the age of twenty-one years to pay over to her all accumulations of said income; thereafter to pay over to her the entire balance of said income quarterly during her life; and upon her death to convey, assign, transfer, and pay over said principal of said trust to her surviving issue, in such shares and proportions as she shall by last will and testament appoint, and in default of such appointment, in equal shares, and in default of such surviving issue, then in
16 equal shares to her full brothers and full sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

Tenth: If I leave surviving me issue of a deceased son or of a deceased daughter of my said wife, Margaret Emerson Vanderbilt and myself, then and in that event I give and bequeath to such issue two million dollars ($2,000,000) in equal shares, per stirpes and not per capita.

Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

I give and bequeath to each of those persons who may be in my employ at my farm known as "Oakland Farm," at Portsmouth, Rhode Island, or on my properties known as "Sagamore Lodge," Camp "Kill-Kare," or "Moose River Tract," or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period.

17 Twelfth: All the rest, residue and remainder of my estate, real, personal and mixed (hereinafter referred to as "residuary estate"), wheresoever the same may be situated, I give, devise and bequeath to the executors of this my will, to divide the same into as many equal shares as I shall leave sons issue of my said wife, Margaret Emerson Vanderbilt, and myself surviving me, and to hold one of such shares, in trust, nevertheless, for each of our said sons; to invest and reinvest the same as hereinafter provided; to collect and receive the income and profits from and of the principal thereof, and after paying therefrom all proper expenses of the administration of said trust and all taxes of any kind properly payable upon

or in respect to said trust fund or the income therefrom, to apply or pay over the balance of said income, hereinafter referred to as "net income," and to convey, assign, transfer and pay over said principal for the benefit of and to the use of said son for whom said share is so held in trust, as follows:

During his minority to apply to his support, maintenance and education so much of said net income as in the judgment of said trustees may be necessary, accumulating meantime any surplus income; when he shall attain the age of twenty-one years, to convey, assign, transfer and pay over to him all accumulations of income and one-quarter of the principal of said share; thereafter to pay over to him the net income of the remaining three-quarters of said share semiannually until he shall attain the age of twenty-five years, and then to convey, assign, transfer, and pay over to him another one-quarter of said share; thereafter to pay over to him the net income of the remaining one-half of said share semiannually until he shall attain the age of thirty years, and then to convey, assign, transfer, and pay over to him another one-quarter of said share; thereafter to pay over to him the net income of the remaining one-quarter of said share semiannually until he shall attain of age of thirty-five years, and then to convey, assign, transfer, and pay over to him the remaining one-quarter of said share.

In the event that I leave surviving me but one son issue of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my said residuary estate be held by my said executors, in trust as aforesaid, for such surviving son.

In the event that I do not leave surviving me a son but do leave surviving me daughters issue of my said wife, Margaret Emerson Vanderbilt, and myself, then and in that event I give, devise and bequeath my residuary estate to my said executors, to divide the same into as many equal parts as I shall leave daughters of my said wife, Margaret Emerson Vanderbilt, and myself surviving me (subject, however, to the provision hereinafter made for the issue of any of our children who may die before me), and to hold one of such shares, in trust nevertheless, as aforesaid, for each such surviving daughter.

In the event that I do not leave surviving me a son and do leave surviving me but one daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my residuary estate (subject, however, to the provision hereinafter made for the issue of any of our children who may die before me) be held by said executors, in trust as aforesaid, for such surviving daughter.

In the event that any one of my said sons or daughters for whom a share of my residuary estate or my residuary estate is held in trust as aforesaid shall die before attaining the age of thirty-five years leaving issue, then I give, devise and bequeath, the principal of said share, or of my entire residuary estate, as the case may be,

or so much of said principal as shall not previously have been conveyed, assigned, transferred and paid over to him or to her, to his or her surviving issue in such shares as he or she shall by last will and testament appoint, and in default of such appointment in equal shares, and in default of such surviving issue then in equal shares to his or her full brothers and or full sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a son but do leave surviving me daughters or a daughter, and issue of deceased sons or daughters or of a deceased son or daughter of my said wife, Margaret Emerson Vanderbilt, and myself, then I give, devise, and bequeath to the surviving issue of each such deceased child in equal shares, per stirpes and not per capita, a share of my residuary estate equal in amount to the share so given, devised and bequeathed to my said executors in trust as aforesaid for each of my surviving daughters, or for my surviving daughter.

In the event that I do not leave surviving me a child issue of my said wife, Margaret Emerson Vanderbilt, and myself, but do leave surviving me lawful issue of a child or lawful issue of children of my said wife and myself, then, if there survive me such issue of but one such child, I give, devise and bequeath all my residuary estate to such issue in equal shares, per stirpes and not per capita; and if there survive me such issue of more than one such child, I give, devise and bequeath my residuary estate to the issue of such children in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt, and myself, then I direct that all my said residuary estate be held by my said executors, in trust as aforesaid, for my son William H. Vanderbilt. And in the event that any child of my said wife, Margaret Emerson Vanderbilt, and myself, who shall survive me shall die before attaining the age of thirty-five years without leaving issue or a full brother or full sister or issue of a full brother or full sister surviving him or her, then I direct that so much of my residuary estate so held in trust for him or her as shall not have been previously conveyed, assigned, transferred and paid over to him or her shall be held by my said executors, in trust as aforesaid, for my son William H. Vanderbilt, or, if he shall then have attained the age of thirty-five years, shall be conveyed, assigned, transferred and paid over to him as and for his absolute property.

In the event that in any of the contingencies mentioned in the immediately preceding paragraph of this my will my residuary estate or any part of my residuary estate shall be held by my said executors in trust for my son William H. Vanderbilt, and he shall die before attaining the age of thirty-five years, leaving issue, then I give, devise and bequeath so much of the

principal of said estate as shall not previously have been conveyed, assigned, transferred and paid over to him, to his surviving issue in such shares as he shall by last will and testament appoint, and in default of such appointment, in equal shares.

In the event that I do not leave surviving me a child or any issue of children or of a child of my said wife, Margaret Emerson Vanderbilt, and myself, and my son William H. Vanderbilt does not survive me, but leaves issue surviving me, then I give, devise, and bequeath my residuary estate to such issue in equal shares, per stirpes and not per capita.

In the event that I do not leave surviving me a child or any issue of a child, then I give, devise, and bequeath all my said residuary estate in equal shares to my brothers and sisters and the issue of any of them that may be then deceased, in equal shares, per stirpes and not per capita.

Thirteenth: I hereby give to the executors of this my will, as trustees of the trusts and of each of the trusts created by this my will, full power and authority, in their discretion, to sell, at public or private sale, at such times and places, and in such manner, and upon such terms and conditions as they shall deem expedient, or to lease or to rent or otherwise, dispose of, in such manner, for such periods and upon such terms and conditions as they shall deem expedient, any and all my real estate, wheresoever the same may be situated,
22 excepting only my said real estate known as "Oakland Farm," as well as any and all personal property, constituting a part of any such trust, and to execute and deliver any and all deeds, leases, or other instruments necessary or proper for the accomplishment of such purposes.

Also, I give to my said executors and trustees full power and authority to invest and reinvest the principal or any part of the principal of any trust fund created by this my will, and any income accumulated during the minority of a beneficiary, as aforesaid, in first mortgages on improved real estate situated within the city of New York; in bonds or stock of the city of New York; in bonds of the State of New York or in bonds of the United States of America; in first mortgage bonds or stock of any railroad company that continuously for a period of seven years has paid dividends of not less than five per cent per annum on its stock, or in mortgage bonds of any railroad company, payment of the principal and interest of which is guaranteed by any other railroad company that has paid such dividends for such period.

Further, if and in the event that any corporation or company whose stocks or securities constitute or are held as a part of the principal of any trust hereby created shall be reorganized or consolidated with any other corporation or company, or opportunity shall be offered to exchange any of its stocks or securities for other stocks or securities issued or to be issued by it, or for the stocks or securities or any other corporation or company, I give to my said executors and trustees full power and authority, in their dis-

23 cretion, upon such terms and conditions as they may deem advisable, to exchange any such stocks or securities so held by them for the stocks or other securities of any such reorganized or consolidated corporation or company, or for other stocks or securities of such corporation or company, or for stocks or other securities of any such corporation or company.

Also, I give to my said executors full power and authority, in their absolute discretion, to settle, compromise, or adjust any claim of any nature whatsoever that may be made or presented against my estate, upon such terms and conditions as they shall deem advisable and for the best interests of my estate, and I hereby expressly relieve them and each of them of any and all responsibility for any error of judgment or of fact that any beneficiary hereunder may consider them to have made in the making of such settlement, compromise, or adjustment.

If at the time of my death my father's estate shall not have been settled and distributed and I shall not have come into full possession of my final share thereof, I authorize my said executors to accept such share of my father's estate as shall be tendered to them by the executors of his will, and to make such settlement, compromise, or arrangement with respect to the amount or to the final receipt and delivery of the same as they may consider advisable; and I direct that no inventory, list, or accounting shall be required either in respect of my father's estate or of my estate, and I fully release my executors and trustees from any such inventory, list, appraisal, or accounting.

24 Fourteenth: I direct that any stock dividends that may be declared upon any of the stocks held as or constituting a part of any trust fund hereby created shall be treated as part of the income or profits thereof and shall be paid over to the person or persons entitled to such income or profits for the time being.

Fifteenth: I direct that my executors shall pay out of my residuary estate any and every inheritance, transfer, or legacy tax which shall be payable upon or under or on account of any gifts, devises, or bequests made by me in, or any rights of inheritance or transfer arising under, this my will by reason of such gifts, devices, or bequests, under the laws of the State of New York or of the United States or of any State therein or under the laws of any other country.

Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will.

I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.

Seventeenth: I hereby revoke any and all other and former wills and codicils by me at any time made.

25 In witness whereof, I have hereunto set my hand and affixed my seal this 16th day of December, in the year of our Lord one thousand nine hundred and thirteen.

ALFRED G. VANDERBILT. [L. S.]

The foregoing instrument, consisting of this and fourteen other typewritten pages, was subscribed and sealed by the testator, Alfred G. Vanderbilt as, and was published and declared by him to be, his last will and testament, at New York City, New York, on the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen, in the presence of us and of each of us, and thereupon we, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

M. S. BARGER, *Newport, R. I.*
E. L. ROSSITER, *Greenwich, Conn.*
ROY C. GASSER, *Plandome, L. I.*

26 *Demurrer.*

United States District Court, Southern District of New York.

The defendant herein, by Roy C. Gasser, his attorney, demurs to the amended complaint of the plaintiff herein on the ground that it does not state facts sufficient to constitute a cause of action.

Wherefore, defendant demands judgment that the complaint herein be dismissed, with costs.

ROY C. GASSER,
Attorney for Defendant, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

27 *Opinion, Learned Hand, D. J.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA against REGINALD C. VANDERBILT.	L. 22–306.
UNITED STATES OF AMERICA against FREDERICK L. MERRIAM.	L. 21–401.
UNITED STATES OF AMERICA against HENRY B. ANDERSON.	L. 21–402.

The cases arise upon the demurrers to complaints at law to recover the income taxes upon certain legacies left the defendants under the will of Alfred G. Vanderbilt, who died in 1915. The will disposed

of a large estate, and set up various independent trusts of indefinite duration. The only parts relevant to these cases are the eleventh and sixteenth clauses, which read as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my
28 uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

* * * * * * *

"Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt; my uncle, Frederick W. Vanderbilt; Henry B. Anderson; Frederick M. Davies; and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will.

"I direct that no bond shall be required in any State or country to qualify my said executors to act as such or as trustees hereunder.

"The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants, so named as executors and trustees, qualified and have administered and are now administering the estate.

The question is whether the legacies so given are exempt as "bequests" or liable to the income tax as "compensation" for personal services.

29 Roy C. Gasser, for demurrants.

Edward F. Unger, C. T. Hendler, and Newton K. Fox, opposed.

LEARNED HAND, D. J.:

There seems to me no question whatever that these legacies in part anyway are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as executors and trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same. It is true that the form of the compensation is a "bequest," and a "bequest" is exempt; hence there is a verbal contradiction between one part of the statute and the other. Yet I can not doubt that all bequests are not exempt. Suppose, for instance, that a man agreed to leave another legacy if he would take care of him while he lived. The legacy would be a "bequest," but can anyone suppose that it would not be "compensation for personal services" which would be taxable?

The defendants argue that such legacies are payable though the executor do not complete his services. That is true. The English rule was that a legacy to an executor was presumably virtute officii and in recompense for his services and he must assent to his
30 appointment, Lewis v. Matthews, L. R. 8 Eq. 277. Yet very little was necessary, much less than formal qualification, Harrison v. Rowley, 4 Ves. 212. Indeed, in Brydges v. Wotten, 1 Ves. & Beam. 134, trustees were allowed their legacies though they had done nothing, probably because the legacies were payable before the trustees could qualify. If so, the rule does not truly apply to trustees. In America, where executors generally receive statutory commissions, such bequests have been spoken of as compensation which must be earned, Matter of Tilden, 44 Hun, 441; Renshaw v. Williams, 75 Md. 498. In some cases the language of the will apparently indicated as much, Harper's Appeal, 111 Pa. St. 243, or at least admitted of that interpretation, Richardson v. Richardson, 145 App. Div. 540. Morris v. Kent, 2 Ed. Ch. 175, much relied on by the defendants, decides nothing to the point, though the vice chancellor in his opinion quotes obiter the English rule that any indication of an assent to qualify is enough.

It seems to me to make no difference whether such bequests be regarded as payable merely on condition of qualification, or only after the services are rendered. I assume the first to be the correct rule, and certainly in the cases at bar the legacies were all payable long before the services could be completed, because there were trusts of indefinite duration, which might extend thirty years or more. The legacies were given with the chance that the executors and trustees might not complete their services. I regard the point, however, as immaterial because the bequests are in either case equally "compensation for personal services." Suppose a master pays
31 his servant in advance, trusting that he will live to complete. Is the hire not a "compensation for personal services"? It is prospective compensation, indeed, but none the less it is not gratuitous, it is given to procure and to pay for the services. At least, how can it be said that it is not compensation, if the servant enters and completes his employment?

Therefore, I attach no importance to the point of which so much is made, that the executor becomes entitled to his legacies on expressing his assent. More important is the opposite side of the same rule, that without such assent he does not become entitled. This rule is not because he gets the bequest eo nomine, it makes no difference that he is named in the will. Moreover, if the theory were that the bequest is given only to the office, he must qualify, which he need not. The condition that he must assent can only be because such bequests are treated as in recompense for his services, and so the books put it. He must at least undertake to perform while he can. If they were true legacies he would get them whether he qualified or not.

But, the defendants say, such bequests as these are in any case not all compensation; in part anyway they are from the testator's bounty. As to the defendants Merriam and Anderson there is not the least reason to suppose that they were not solely in compensation for their services. The commissions on this estate do not appear in the record, but the will shows that the estate itself was very large indeed. No one could possibly tell, not even the testator, what the commissions would be. It may be that they would be less to each ex-
32 ecutor and trustee than $200,000, and it may be that they would be more. Each defendant would get separate commissions as executor and second commissions also as trustee for so much as was in trust. He would also get commissions on the income of the trusts. Suppose, moreover, that the testator thought the legal commissions too little, and wanted to make sure that the defendants would qualify, so that his estate would certainly have their services. It is obviously impossible to say whether these bequests were in part bounty, even if the commissions should turn out much less.

As to the defendant Vanderbilt, I confess it seems scarcely possible that the testator did not mean the legacy to do more than compensate him for his services. He was a brother, and it seems unlikely that he was given the larger legacy to insure his qualifying or that the testator set that much more value to his services. Moreover, there is every reason to suppose that he would be the recipient of the testator's bounty. I have no question that had the testator been faced with the fact that his will in this form subjected the whole of his brother's legacy to taxes he would have changed it. But if he has in fact bequeathed the sum to him as compensation how can I apportion it partly as such and partly as free bounty? Clearly not, if the language be unambiguous. I can not substitute another expression, which I feel sure he would have used, had the consequences of his actual language been brought to his attention. I have already said that the language of the sixteenth clause seems to me to make the legacies compensation, and, if so, would it not contradict
33 that language to say that they were only in part compensation? The inequality in the bequests is not an inevitable sign that all might not have been so intended. The testator might think one executor's services to be worth more than another, and that what would secure one would not secure the other. I think the will means that all is to be compensation.

And if I were to say that the language was ambiguous what rule could a court or jury adopt to apportion the compensation? Granting that it would find that in part it was bounty, how could it say how much? It could not say that the bequests to the defendants, Anderson and Merriam, were the test, because if Vanderbilt is to be allowed to try the issue, so must they. If it were possible to make a division of the legacies based upon any words in the will, and, if, as I am for the moment assuming, the language used were ambiguous, then I can see how the issue might arise. But, granting

that it is ambiguous, there is no language through whose interpretation the legacies may me divided. That must be imputed into the will without any intimation from the testator at all, and the result would not be a will, but the creature of the court.

I therefore conclude that the whole of the legacies must be treated as compensation and that the demurrers must be overruled. Judgments will go on the complaints as prayed.

L. H., *D. J.*

AUGUST 6, 1921.

34 *Opinion, L. Hand, D. J., filed September 12, 1921.*

UNITED STATES OF AMERICA, vs. R. C. VANDERBILT. } 22–306.

UNITED STATES OF AMERICA, vs. H. B. ANDERSON. } L. 21–402.

UNITED STATES OF AMERICA, vs. F. L. MERRIAM. } L. 21–401.

In this case, as I said on my original opinion, the question was not argued at bar whether assuming that the legacies were in fact taxable they must be taxable altogether, I did consider that question, and decided that they were taxable in whole. Subsequent reflection has led me to doubt whether this is necessarily the case and I am therefore not prepared to give judgment absolute unless the defendants do not choose to answer over. It is in any case enough that the plaintiff is entitled to some relief; that being so the demurrers must be overruled. If, however, the defendants wish to insist that the legacies are taxable only in part, that part to be ascertained by reference to the amount given as compensation, assuming there is a way of dividing them, they must plead a partial defense.

35 I have, therefore, signed judgments respondeat over and the defendants may plead if they will. If they are content to rest their case upon the demurrers they can allow judgment absolute to pass against them at the expiration of the time to plead over.

Anything I said in my original opinion regarding the impossibility of dividing the legacies for the purpose of taxat'on must be regarded as not decided until some further argument.

L. HAND.

SEPTEMBER 12, 1921.

36 *Order overruling demurrer.*

At a stated term of the United States District Court held in and for the Southern District of New York, at the United States Courts and Post Office Building, Borough of Manhattan, city, county, and State of New York, on the 12th day of September, 1921.

Present: Honorable Learned Hand, United States district judge.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard by this court,

Now, after hearing Roy C. Gasser, Esq., of counsel for the defendant, in support of said demurrer, and Edward F. Unger, Esq.,
37 assistant United States attorney, of counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon, upon motion of William Hayward, United States attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered that said demurrer be, and the same hereby is, in all respects overruled, and it is

Further ordered that plaintiff have final judgment against the defendant for the sum of $10,912.26 with interest thereon at the rate of 6% per annum from the 30th day of June, 1916, and for its costs to be taxed.

LEARNED HAND, *U. S. D. J.*

38 *Judgment.*

United States District Court, Southern District of New York.

The issues of law raised by the demurrer of the defendant to the amended complaint of the plaintiff herein having duly come on to be heard before the Honorable Learned Hand, United States district judge, at a stated term of this court held on the 20th day of July, 1921, Roy C. Gasser, Esq., of counsel for the defendant, having been heard in support of said demurrer, and Edward F. Unger, Esq., assistant United States attorney for the Southern District of New York, of counsel for the plaintiff, having been heard in opposition thereto, and due deliberation having been had thereon, and the court having handed down its opinion and supplemental opinion on the 6th day of August, 1921, and the 12th day of September, 1921, respectively, overruling the said demurrer, and an order having been duly made and entered herein on the 12th day
39 of September, 1921, overruling said demurrer to the amended complaint of the plaintiff herein and ordering that the defendant have 20 days in which to plead to the complaint and that in the event of his failure so to do, plaintiff have judgment for the sum of $10,912.26, with interest at 6% from the 30th day of June, 1916, with costs, and the time of the defendant to plead to said

amended complaint having expired and no pleading having been interposed by the defendant, and the costs of the plaintiff having been taxed in the sum of

Now, on motion of William Hayward, United States attorney for the Southern District of New York, it is

Adjudged that the plaintiff have and recover of the defendant the sum of $10,912.26, together with the sum of $3,464.64, interest thereon, at the rate of 6% per annum, from the 30th day of June, 1916, together with the sum of $17.47 costs of the plaintiff as taxed, in all the sum of $14,394.37, fourteen thousand three hundred ninety-four and 37/100 dollars, and that plaintiff have execution against the defendant above named therefor.

Judgment signed this 15th day of October, 1921.

ALEX. GILCHRIST, JR., *Clerk.*

40 *Petition for writ of error.*

United States District Court for the Southern District of New York.

[Title omitted.]

And now comes the plaintiff in error, Frederick L. Merriam, by Roy C. Gasser, his attorney, and says that on the 15th day of October, 1921, this court entered judgment herein in favor of the defendant in error and against the plaintiff in error for the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37); and that in the judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff in error and whereby this plaintiff in error feels himself aggrieved, all of which will appear in more detail from the assignment of errors which is filed with this petition.

Wherefore the plaintiff in eror prays this court for an order allowing him to prosecute a writ of error in his behalf to the
41 honorable United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of under and according to the laws of the United States of America in that behalf made and provided, and that a transcript of the record, proceedings and papers of this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Second Circuit, and also that an order may be made fixing the amount of the security which the plaintiff in error shall give and furnish upon the said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray, etc.

Dated, November 4th, 1921.

FREDERICK L. MERRIAM,
By Roy C. Gasser,
Attorney for Plaintiff in Error, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

42 *Order allowing writ of error.*

At a stated term of the United States District Court for the Southern District of New York, held at the New York Post Office Building in the said district in the Borough of Manhattan, city of New York, on the 4th day of November, 1921.

Present: Honorable Learned Hand, United States district judge.

[Title omitted.]

Upon the 4th day of November, 1921, comes Frederick L. Merriam, by Roy C. Gasser, his attorney, and files herein and presents to this court his petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by him; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, and upon which this court
43 took and exercised jurisdiction, and upon which the judgment herein was rendered, duly authenticated, should be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and various proceedings may be had as may be just and proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff in error, Frederick L. Merriam, giving bond according to law in the sum of $16,000, which shall operate as a supersedeas bond.

It is accordingly

Ordered that a writ of error be, and the same is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore rendered herein on the 15th day of October, 1921, for the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37) and the actions and rulings of the court upon which said judgment was rendered; and it is

Further ordered that upon the making and filing with the clerk of this court of said bond all further proceedings be suspended and stayed until the final determination of such writ of error by the United States Circuit Court of Appeals for the Second Circuit and the coming down of the mandate of that court to this court.

L. HAND, *U. S. D. J.*

44 *Assignment of errors.*

United States District Court for the Southern District of New York.

[Title omitted.]

Now comes the plaintiff in error, Frederick L. Merriam, by Roy C. Gasser, his attorney, and in connection with his petition for a writ of error, says that in the record, proceedings of trial, and in the final judgment herein manifest error has intervened to the

prejudice of the plaintiff in error, and he assigns the following reasons, to wit:

(1) That the said United States District Court for the Southern District of New York erred in overruling the demurrer interposed by the plaintiff in error to the amended complaint filed in this action.

(2) The said court erred in holding that said amended complaint states facts sufficient to constitute a cause of action.

45 Wherefore, said Frederick L. Merriam, plaintiff in error herein, prays that the judgment entered in this cause in the office of the clerk of the United States District Court for the Southern District of New York, on or about the 15th day of October, 1921, in favor of the defendant in error and plaintiff below and against the plaintiff in error and defendant below, in the sum of fourteen thousand three hundred ninety-four and 37/100 dollars ($14,394.37), because of error, be reversed, and the said District Court be directed to enter a judgment sustaining said demurrer and dismissing said amended complaint and for such other and further relief as to the court may seem just and proper.

ROY C. GASSER,

Attorney for Plaintiff in Error, Frederick L. Merriam, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

46 *Undertaking.*

In compliance with the order allowing writ of error made the 4th day of November, 1921, the plaintiff in error gave a bond in the sum of $16,000, as therein provided, of the Fidelity and Deposit Company of Maryland, which said bond was approved by Mr. Justice John C. Knox, D. J., on the 10th day of November, 1921, and filed in the office of the clerk of the United States District Court for the Southern District of New York on the 12th day of November, 1921.

47 *Citation.*

United States District Court for the Southern District of New York.

By the Honorable Learned Hand, one of the United States district judges for the Southern District of New York, in the Second Circuit, to United States of America, defendant in error, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the city of New York, in the district and circuit above named, on the 3rd day of December, 1921, pursuant to a writ of error filed in the clerk's office of

48 the District Court of the United States for the Southern District of New York, wherein Frederick L. Merriam is

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 4th day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States the one hundred and forty-sixth.

L. HAND,
United States District Judge for the Southern District of New York, in the Second Circuit.

49 *Stipulation as to transcript.*

United States District Court, Southern District of New York.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 20th, 1922.

ROY C. GASSER,
Attorney for Plaintiff in Error.
WM. HAYWARD,
United States Attorney,
Attorney for Defendant in Error.

50 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

FREDERICK L. MERRIAM, PLAINTIFF IN ERROR,
(defendant below).
vs.
THE UNITED STATES, DEFENDANT IN ERROR,
(plaintiff below).

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

51 *Opinion.*

United States Circuit Court of Appeals for the Second Circuit.

No. 248–249. October Term, 1921.

Argued March 21, 1922. Decided April 3, 1922.

FREDERICK L. MERRIAM, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	In error to the District Court of the United States for the Southern District of New York. Before Hough, Manton, and Mayer, circuit judges.
HENRY B. ANDERSON, PLAINTIFF IN ERROR (defendant below), against UNITED STATES OF AMERICA, DEFENDANT IN error (plaintiff below).	

Writ of error to the District Court for the Southern District of New York. Actions by the United States of America against
52 Frederick L. Merriam, defendant, and Henry B. Anderson, defendant, to recover an income tax under the income tax act of 1913 (38 Stat. 114, 116).

Roy C. Gasser, Esq., for plaintiffs in error.

Roy C. Gasser, Esq., William H. Hayes, Esq., of counsel.

William Hayward, Esq., U. S. atttorney for the Southern District of New York, for defendant in error.

Thomas J. Crawford, Esq., asst. U. S. attorney, P. C. Alexander, Esq., special attorney, Bureau of Internal Revenue, of counsel.

MANTON, Circuit Judge:

We shall refer to the parties herein as plaintiff and defendants, as below.

Plaintiff sued to recover an income tax claimed to be owing by each of the defendants, arising out of moneys received by them from the estate of Alfred G. Vanderbilt. After the service of an amended complaint, a demurrer was interposed and motions were made for judgments which resulted in judgment for the plaintiff in each of these actions.

Alfred G. Vanderbilt died May 7, 1915, leaving a will which was duly admitted to probate on June 16, 1915. In that will he made a bequest to each of the defendants. This article of his will reads as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars ($200,000); to Frederick M. Davies, five hundred thousand dollars ($500,000); to

Henry B. Anderson, two hundred thousand dollars ($200,000); to Frederick L. Merriam, two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, ten thousand dollars
53 ($10,000); and to Howard Lockwood, one thousand dollars ($1,000).

"I give and bequeath to each of those persons who may be in my employ at my farm known as 'Oakland Farm,' at Portsmouth, Rhode Island, or on my properties known as 'Sagamore Lodge,' Camp 'Kill-Kare,' or 'Moose River Tract,' or on any of my other property in Hamilton County, New York, or in my stable or garage in the city of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an amount equivalent to his or her wages for the last year of such period."

Article sixteenth thereof provides as follows:

"The bequests herein made to my said executors are in lieu of all compensation or commission to which they would otherwise be entitled as executors or trustee."

These bequests were paid to the defendants in 1915 in the due administration of the estate. The amended complaint recites that each bequest was received "as given to him by said will." Each of the defendants made a return of his income for taxation prior to March 15, 1916, and neither included in said return this legacy so received. Their positions rest upon the act of Congress then in force providing that "income of a taxable nature shall not include the value of property * * * acquired by bequest."

The statute provides in §11B for exemptions and deductions and that "net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and whatever form * * * or the transaction of any lawful business carried on for gain or profit or
54 gains or profits or anything derived from any source whatever including the income from but not the value of property acquired by gift, bequest, device, or descent."

Both of the defendants qualified as executors, as did the others named, excepting Mr. Davies, who died five days before the death of the testator and his legacy subsequently lapsed. The Commissioner of Internal Revenue made these legacies taxable as income, and the refusal to pay the assessment gave rise to these actions. The defendants contend that the bequests to them were legacies in the universally accepted and legal meaning of the term and as it is used in the income tax act. Further, that what was received is not taxable income because it was not given as consideration for services and was not derived from labor. (Merchants Trust Co. vs. Smietanka, 255 U. S. 509.) Income has been frequently described "as a gain derived from capital, from labor, or from both combined." (Stratton's Independence vs. Howbert, 231 U. S. 399.) And later, using

the same definition, the Supreme Court has said that income can be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. (Eisner vs. Macomber, 252 U. S. 189.) The conditional or unconditional voluntary disposition of personal property by will is a bequest. (Jessup's Redfield, §917, p. 1138.) A bequest in lieu of dower which is a legacy given conditional upon the surrender by the legatee of a right of dower has been held to be a bequest. (Orton vs. Orton, 3 Keyes, 486.) In the cited case the legacy was given in lieu of dower, and a provision was made that should there be a surplus in the estate after the payment of the legacies the legatee should share proportionately therein. The executors assumed the position that the widow was not entitled to any part of the surplus on the ground that a bequest in lieu of dower was not a legacy and that therefore she was not a legatee, but the court held that notwithstanding the bequest to the wife was declared to be in lieu of dower, it was still a legacy. "Such it was in
55 legal as well as common parlance and it was constantly called by that name in the books." Direction by the testator that his debts should be paid negatives the presumption that a bequest to a creditor is conditional upon a wavier of his claim and makes his legacy absolute. (Boughton vs. Flint, 74 N. Y. 476.) Bequests to executors or trustees in lieu of compensation for their services or "for their care and pain" have been held to be bequests in every acceptation of that term. And a legacy to an executor, even expressed to be "for care and pains," is not to be regarded in the light of a debt or as founded in contract or to be governed by principles applicable to contracts, for to do so would make the executor who undertook the discharge of his duties entitled to his legacy in preference to all other legacies even if there were a deficiency of assets to satisfy all of them, and a legatee of this description must abate equally with other legatees. (Morris vs. Kent, 2 Edwards Chancery, 179.) A will providing a bequest of $700 over and above any and all commissions to an executor entitled him to receive it (upon condition that the executor should accept and qualify) not as compensation for services and it was held not to abate with the genêral legacies. It was said to be a general legacy and subject to abatement. (Waters vs. Collins, 3 Dem. 374.) Lord Hardwicke in Heron vs. Heron (2 Atk. [English Reports, vol. 26, p. 507] 171) says that bequests to executors, "even though given expressly for care and pains, do not differ from general legacies so as to take them out of the ordinary rule in respect to abatement for deficiency of assets." Clayton vs. Akin (38 Ga. 320) held that one thousand dollars given and bequeathed "for extra trouble he may have had in executing this my will" was a legacy to the executor in every aspect of it, a general legacy, and as to abatement in case of a dificiency of assets must take its fate as such.

Bequests are either absolute or conditional, vested or contingent. It was not essential for the legatees named to qualify in order to

become entitled to their legacies. A bequest to one in lieu of compensation for his services which is conditional only upon his
56 willingness to qualify and serve if circumstances permit him to do so, is nevertheless a legacy. We must assume that Congress had in mind, by using the term "bequest" in the income tax law, to give to it that settled rule of construction well known and sanctioned by judicial decision. (Kepner vs. U. S., 195 U. S. 100.) "That presumption is resistless except against an intention imperatively clear." (Lynch vs. Turrish, 247 U. S. 221.) In interpreting statutes, levying taxes, it is the rule "not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out." (Gould vs. Gould, 245 U. S. 151.) The case differs from one where there is a provision in a will to pay a contractual obligation, a debt, which would be collectible even if the obligor did not provide for its payment by will, for there the money agreed to be paid would be acquired by contract and not by bequest. (In re Baker, 178 N. Y. 575; Matter of Vanderbilt, 184 App. Div. 661; In re Alfred G. Vanderbilt, 226 N. Y. 638.) Everything that comes is *is* not income taxable under the statute. (So. Pac. Co. vs. Lowe, &c., 247 U. S. 330.) It is clear that Congress intended the words "acquired by gift, bequest, devise, or descent" to be words of exception and not of exemption. The word "bequest" is used in the exemption clause of the act, and the act provides that income shall include all gains derived from compensation for personal services except property acquired by bequest. It is clear that it was the intent of the testator to give the legacy and not to permit the executors to work for it.

It is contended by the Government that article sixteenth of the will is in effect a testamentary fixing by the testator of the compensation to be paid for services to be rendered by his executors, but bequests are not compensatory, they are donative. The taxing statute intended something different. The compensation for personal services of whatever kind and in whatever form immediately follows and supplements the term "salaries" in the statute, which indi-
57 cates a periodical payment made as compensation for regular employment (Benedict vs. U. S., 176 U. S. 357) and wages which are generally applied for manual labor. (Matter of Stryker, 158 N. Y. 526.) We think Congress contemplated and intended to cover payments under contracts of employment expressed or implied and intended the taxing statute to reach all forms of payment for services rendered. But this does not affect the intention of Congress that the essential factor be present that whatever is sought to be taxed under the phrase must be a consideration for work performed or to be performed, and that it must be compensation derived from or flowing from labor. The income within the purview of the Constitution is defined to be a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained

through a sale or conversion of capital assets. (Eisner vs. McDonald; Straton's Independence, supra; Doyle vs. Mitchel Bros. Co., 247 U. S. 179.) A legacy acquired by bequest does not proceed from labor. The question must be determined, not by the phrase "in lieu of commissions" but upon the question of whether the bequest was in fact a consideration for services to be rendered. The bequests were not stipulated as a condition for service. As a general principle, if an executor unequivocally manifests an intention to act in the executorship, that will be a performance of the condition upon which his legacy depends, although he be prevented by circumstances from actually serving. (Williams on Executors, Sixth Am. Ed. Vol. II, 1394; Morris vs. Kent, supra; Scofield vs. St. John, 65 How. Pr. 292.) In the case of Brydges vs. Wotten (1 Ves. & Beam, 134) a legatee named as trustee and to whom the legacy was given as a token of regard and recompense for his trouble died nineteen months after the death of the testator, without having acted at all, and he was held to have become entitled to his legacy in the absence of any refusal or neglect to act. The rule of law is well settled that, where bequests are made conditional only upon being ready and willing to assume the executory office provided circumstances permit
58 them to do so, to entitle them to legacies it is not required of them that they should render services for which they would have a legal claim for compensation in the form of commissions. Inability of a legatee to enter upon performance of service as executor would not prevent the absolute vesting of a bequest in him in lieu of commission. (Bean vs. Carlton, 12 N. Y. Supp. 519, affd. 126 N. Y. 642; Wheeler v. Board, 12 Johns. 363.)

Assuming that the executors named had all died in a common disaster before the formalities of the probate of the will had been completed, could not their representatives respectively insist upon payment of the respective legacies? There is little doubt that the legacies would then have been acquired by bequest within the meaning of the law. We think the whole of each legacy was payable independent of services. It was an acquisition to each legatee by bequest within the meaning of the taxing act and was therefore not taxable as income.

Judgments reversed.

59-60 *Judgment.*

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York on the 10th day of April, one thousand nine hundred and twenty-two.

Present: Hon Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, circuit judges.

[Title omitted.]

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

C. M. H.
M. T. M.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

61 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 60, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Frederick L. Merriam, plaintiff in error, against United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 19th day of June, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the said United States the one hundred and forty-sixth.

[SEAL.] WM. PARKIN, *Clerk.*

62—64 *Writ of certiorari and return.*

(Filed Nov. 16, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Frederick L. Merriam is plaintiff in error and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York,

and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

65 In the Supreme Court of the United States.
October Term, 1922.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

JAMES M. BECK,
Solicitor General.
ROY C. GASSER,
Counsel for Respondent.

OCTOBER 30, 1922.

66–70 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 9, 1922.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

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